No. 82-1079

Office-Supreme Court, U.S.
FILED
MAR 24 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

FAIRLEIGH S. DICKINSON, JR.,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION, ARNOLD S. WELLMAN, MORTON PUPKO, RUBIN POLNE, MORDECAI ROSENFELD, JAY-GRO FABRICS, INC. PENSION TRUST, BECTON, DICKINSON & CO.,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Reply Brief is submitted to answer certain new arguments presented by respondent Securities Exchange Commission ("SEC") in its Opposition Brief.

(1) The SEC contends at page 10 that its promulgation, several months after the events in this case, of a rule which defines beneficial ownership, 17 C.F.R. §240.13d-3(a), makes this case inappropriate for review. The SEC is incorrect for two reasons. First, this very rule was discussed by the SEC in the briefs it submitted to both the District Court and

the Second Circuit.* As a result, the Circuit, in determining what constitutes beneficial ownership, considered its "power to commit" standard to be consistent with the "power to dispose" language in the rule. 682 F.2d at 365 n.12, 367 n.13. Thus the Second Circuit's vague standard, if left standing, will undoubtedly govern or heavily influence construction by the courts and the securities industry of "power to dispose". Whatever apparent objective test the rule's "power to dispose" language seemed to call for (such as the right to sign or direct a stock transfer) is lost in the Second Circuit's interpretation of the rule. Thus this case presents a fully litigated determination which is ripe for this Court's review.

Second, the issue in this case is not whether there was the "power to dispose" of stock as opposed to the "power to commit" stock. Rather, the issue is whether beneficial ownership can be established subjectively by attempting to analyze the influence one has over another, as the SEC contends and the courts here have found, or, rather, whether there should be a readily ascertainable and objective standard such as voting control or the right to decide on transfers. A new test has been fashioned here, in direct conflict with a prior decision of the Second Circuit in *GAF Corp.* v. *Milstein*, 453 F.2d 709, 716 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) as well as with the Seventh Circuit's decision in *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 112 (7th Cir. 1970), each of which had required proof of voting control to establish beneficial ownership. In sum, the regulation does not change the legal analysis. The issue of the proper standard for determining whether one has

* *See, e.g.*, SEC Post-trial Brief at 15-16; SEC Brief on Appeal at 60 n.43.

the "power to dispose" of or the "power to commit" stock is an important one, which has been fully litigated, and which should be reviewed by this Court.

(2) It is no solution to this fundamental problem of vagueness, as the SEC now contends at pages 12-13, to say that a shareholder who agrees with someone else, such as an investment banker, to sell stock can simply investigate the latter's influence over other shareholders. When the test is vague, as here, the answer will not be readily determinable and the result is likely to be litigation, given the motivation of management to deprive dissidents of the help of investment bankers.

Indeed, the facts of this case show how difficult such an inquiry is when dealing with large investment banking firms and mutual funds. The efforts of Mr. Lipton, set forth in the Petition, resulted in the conclusion by Mr. Dickinson's personal counsel that the Funds were independent.* The decision below rejected this finding on the basis of actions by the Funds' directors *nine months later.*

The SEC's Opposition Brief also fails to deal properly with the Dunning and Lufkin interests. The stock attributed to Dunning was virtually all held in trusts for which

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* Contrary to the SEC's statement at page 14 n.7, Mr. Dickinson through his personal counsel, Jerome Lipper, relied on Mr. Lipton's investigation. Mr. Lipton testified at trial (page 2928 of the transcript) that he communicated his belief that no 13(d) filing had to be made to Mr. Lipper, and Mr. Lipper, in answer to a question posed by an SEC examiner at a deposition during the remedy phase of the proceeding, testified that in the spring of 1977

> "Mr. Lipton advised me . . . he had reviewed in detail with Mr. Zeller the relationship between Eberstadt and Chemical Fund.
>
> * * *
>
> And Mr. Lipton concluded, based on what he had indicated to me, that he saw no problem."

(Lipper Dep., Jan. 30, 1980 at 34-35).

Maryland law and the law of trusts generally required that both trustees approve any sale or joint venture, such as joining a 13(d) group. *See* Petition at 3. Yet, this trust stock, according to the SEC, was part of the group as early as April 1977, when the undisputed proof was that Dr. Dunning's co-trustees had not even been aproached about the possibility of selling or joining a group with Mr. Dickinson. Indeed they were not asked until January 1978, at the time of the Sun offer. As for Lufkin, he was held to have beneficial ownership in April 1977 of stock held by three individuals, who at the time were not co-venturers of Lufkin's, when the undisputed evidence was that they, like the Dunning trust co-trustees, had no idea of even the possibility of a sale until the Sun offer in January 1978. In short, the new law of 13(d) groups, as set forth in this case, requires an ability to predict not only the future conduct of individuals such as the Funds' directors but also of federal courts as to whether they will apply principles such as those of the law of trusts and partnerships. This is another reason why the case merits review.

(3) To establish beneficial ownership, all the prior authorities, such as *GAF Corp.* v. *Milstein, supra,* and *Bath Industries, Inc.* v. *Blot, supra,* had required proof of voting control or other objective indicia of economic interest. In an attempt to fit the facts here into those cases, the SEC contends that Eberstadt M & D had proxies to vote securities owned by the Funds. Opposition Brief at 4, 11. These proxies, however, were only for routine matters such as non-contested elections for directors of companies in which the Funds owned shares.*

* As stated by George Nelson, a Surveyor Fund director: "If there was something special or controversial, it would be brought up to the directors." (Nelson Dep. at 57).

Proxies for such routine matters do not prove voting control for 13(d) purposes. The courts in the *GAF* and *Bath Industries* cases were concerned only with votes which related to potential shifts in corporate control, not with votes in uncontested elections. *See GAF Corp.* v. *Milstein, supra,* 453 F.2d at 716 and *Bath Industries, Inc.* v. *Blot, supra,* 427 F.2d at 112. Here, the directors of the Funds retained their right to vote on any contested matter such as in a proxy fight, or in connection with the sale of securities, such as the BD stock, when Eberstadt was also acting as investment advisor to the potential acquiror.* They also retained the right to vote on whether to join a 13(d) group. *See* Deposition of Steven West, partner of Sullivan & Cromwell, the Funds' counsel, at 110-11. Therefore, the proxies in question do not prove that the Funds had delegated voting control for 13(d) purposes to anyone.

(4) The SEC at pages 17-18 claims there is no conflict between the decisions in the instant case and *GAF Corp.* v. *Milstein, supra,* on the one hand, and *Bath Industries, Inc.* v. *Blot, supra,* on the other, on the issue of whether Section 13(d) requires an intent to acquire additional shares. To prove this, the SEC has set forth an incomplete quote from the *Bath Industries* case, which further omits the emphasis the Seventh Circuit placed on certain words. The full quote is as follows:

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* Roger Murray, an independent director, testified:

> "[o]ur working understanding was that we would not enter into large substantial transactions not previously discussed with the board without having a consensus of the full panel of disinterested directors, especially when it was a company with which the Eberstadt firm had historically had an investment banking association."

Murray Dep. at 2058.

"However, when such a group of existing shareholders reaches the point where it decides to buy additional stock to reinforce its position against management, full disclosure for the benefit and protection of other stockholders and investors will be required. The clear purpose of the legislation is to protect these stockholders and investors, and it is at this point that the need for the Act's protection becomes critical. Thus it follows that once the group *agrees* to act in concert *to acquire shares,* its members must comply with the Act's disclosure requirements whether or not any one of them has at that time acquired stock in furtherance of the underlying plan. *See* House Rep. No. 1711, *supra.*

Apart from the unlikely execution of a formal agreement by a group to acquire additional shares in support of its objectives, proof of such an agreement to acquire would be difficult for anyone not privy to the group's plan. The establishment of such purpose should not be permitted to raise an insuperable barrier to a reasonable construction of the Act in carrying out the evident Congressional intent. Hence, we have concluded that once it is shown that such a group has agreed to pursue a common objective, and once it is further shown that a member of the group has *thereafter* purchased additional shares of the corporation's stock, then a *rebuttable presumption* arises that such purchase was made pursuant to an agreement of the group as of that date to acquire shares in furtherance of its objectives. Compliance with the Act's disclosure provisions would be required within ten days of such purchase."

427 F.2d at 110 (emphasis in original.)

The *GAF* court, moreover, clearly believed it was creating a different standard. It said:

> "In light of the statutory purpose as we view it, we find ourselves in disagreement with the interpretation of *Bath Industries, supra,* that the group owning more than 10%, despite its agreement to seize control, in addition, must agree to acquire more shares before the filing requirement of section 13(d) is triggered."

453 F.2d at 718. And, every commentator on the issue has seen the difference too.* Thus, there is an important conflict between the circuits which makes this case an appropriate one for certiorari.

(5) The SEC further contends at page 15 of its Opposition Brief that review is not necessary on the issue of whether Section 13(d) requires an intent to acquire additional stock because of a regulation it adopted shortly after the events in this case, 17 C.F.R. §240.13d-5(b)(1). This regulation, however, merely adopts the *GAF* court's holding that additional acquisitions of stock are not required under Section 13(d), while rejecting that of *Bath Industries, supra,* which had held that an intent to acquire more stock is required.** When boiled down, the SEC's argu-

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* *See* Young, *Section 13(d)—A New Element in the Battles for Control of Corporate Managements: The Implications of GAF Corporation* v. *Milstein,* 27 The Business Lawyer 1137, 1148 (1972); Comment, *Securities Regulation: Section 13(d) from Blot to GAF,* 50 N.C. L. Rev. 1188 (1972); Comment, *GAF Corp.* v. *Milstein: An Interpretation of the Securities Exchange Act Section 13(d),* 45 Temple L. Quarterly 649, 651-52 (1972); Comment, *Two Approaches to Section 13(d): Bath Industries, Inc.* v. *Blot and GAF* v. *Milstein,* 34 Univ. of Pitt. L. Rev. 153 (1972); Comment, *Federal Securities Regulation: The Purchase Requirement for Group Filings Under Section 13(d) of the 1934 Securities Act,* Wash. U. L. Quarterly 573, 574 (1972).

** This is made clear by the SEC Release explaining this rule which cites the *GAF* decision as the only authority for its position. Securities Exchange Act Release No. 13291, 1976-1977 CCH Fed. Sec. L. Rep. ¶80,980 at 87,580 and 80,587 n.12.

ment is that review is inappropriate simply because it has adopted a regulation which is the precise equivalent of its litigation position. The legal analysis of whether the statute requires acquisitions of stock is not changed because there is now a rule to that effect which takes the Second Circuit rather than the Seventh Circuit position. Resolution of that conflict merits review by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 24, 1983

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